BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LONNIE DEAN FARRIS Claimant	)	
VS.	)	Docket No. **1,041,223**
HALLMARK CARDS, INC. Self-Insured Respondent	)	

ORDER

Self-insured respondent requested review of the August 28, 2011, Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on December 1, 2011.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for the claimant. John D. Jurcyk of Kansas City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. It should be noted that the listing of the evidentiary record in the Award contains a typographical error regarding one deposition and should read, the deposition of Lonnie Farris, May 3, 2011, instead of Lonnie Harris.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained a 76 percent work disability based upon a 92 percent wage loss and a 60 percent task loss.

Respondent requests review of the following: (1) whether claimant sustained a personal injury by accident on July 23, 2007; (2) whether claimant gave timely notice of the accident; (3) nature and extent of claimant's disability; and, (4) whether claimant's compensation should be reduced in light of retirement benefits paid to him by respondent. Respondent argues that claimant failed to prove that his accidental injury arose out of and in the course of employment. Respondent further argues claimant did not provided timely notice of his accident nor did he suffer any permanent impairment. In the alternative, respondent contends that claimant's compensation benefits should be reduced by $446.62 per a week pursuant to K.S.A. 44-501(h).

Claimant argues the respondent is not entitled to a credit pursuant to K.S.A. 44-501(h). Claimant further argues that the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant injured his low back lifting a television at home in October 2006. Claimant suffered low back pain radiating down into his left leg. He was treated by Dr. John Gilbert. An MRI was performed on October 24, 2006, and was read as revealing a broad based disk bulge at L5-S1, facet degeneration, bulging at L4-5, and abnormal soft tissue density at L3-4 consistent with either a loose fragment or disk extrusion behind the body of L4. Claimant received epidural injections in October and November 2006 from Dr. Deepak Parulkar. In January 2007 claimant returned to light-duty work for respondent. The epidurals resolved claimant's lower extremity symptomatology but claimant had some residual back pain and was referred to Dr. Michael Smith for a surgical consult. No surgery was recommended and claimant was released to full-duty work without restrictions on February 22, 2007.

After his return to full-duty work, claimant noted that he had tweaked his back a few times at work and had gone to the plant nurse on those occasions for ibuprofen and then would return to work. But claimant did not receive any other medical treatment for his back.

On July 23, 2007, claimant was lifting a skid at work when he twisted wrong and immediately experienced pain in his lower back and tailbone. Claimant noted this incident was worse than before as he could hardly walk. And he noted his pain was more on the right side and lower in his back than when he had injured his back at home in October 2006.

Claimant told his supervisor that he had hurt his back and was sent to the plant nurse. The plant nurse gave claimant some ice to put on his back and some ibuprofen. Claimant performed light-duty work the remainder of his work shift. The next morning when he reported to work his back pain had not improved and he was referred to St. Francis Hospital's emergency room. Dr. Donald Mead evaluated claimant and prescribed some pain pills, a muscle relaxer and physical therapy. The doctor returned claimant to work performing light-duty work but when claimant presented his restrictions to respondent he was told respondent was not able to provide light-duty work.

An MRI study was performed on August 27, 2007, which revealed a transitional vertebral body at the S1 level, prominent posterior disk bulging at L4-5 and central stenosis

from L4 through S1. Claimant was provided conservative treatment and was referred to Dr. John Ebeling, a neurosurgeon, for a surgical consult. No surgery was recommended but claimant received an epidural steroid injection on October 17, 2007. Unfortunately, the epidural steroid injection did not provide claimant with any significant relief.

Claimant was then referred to Dr. Glenn Amundson, an orthopedic surgeon. Dr. Amundson first saw claimant on December 12, 2007. Dr. Amundson reviewed claimant's medical records and also took a history. Claimant complained of low back pain radiating into his right buttock. Claimant admitted to having a history of low back pain which resulted in two epidurals and complete resolution of his pain.

Upon physical examination, the doctor noted claimant had pain at the L4-5 level and some facet irritability and restricted range of motion with no evidence of radiculopathy. Dr. Amundson's diagnosis was lumbar spondylosis, spinal stenosis at L4-5, and low back pain. Dr. Amundson did not recommend surgery but did recommend claimant have facet blocks followed by radio frequency denervation to provide pain relief and avoid surgical intervention.

Dr. Amundson noted that he did not have the original MRI in order to compare the results of the October 24, 2006 MRI with the August 27, 2007 MRI. But the doctor noted the reports were significantly different as the first MRI noted concerns with an extruded or free fragment at the L3-4 level on the left and the second MRI did not mention that finding. In his report dated December 12, 2007, the doctor suggested a reason for this difference when he responded to a question whether the new incident was just an exacerbation of claimant's pre-existing condition from the October 2006 accident at his home. The doctor replied:

> The medical records were completely reviewed from 10/23/06 to 2/22/07 as documented in the Review of Medical Records section following the History of Present Illness. As I reviewed the medical records, I was suspicious that the predominant injury or feature was going to be the injury from 10/23/2006. However, the MRI reports differ significantly. In the original MRI there were concerns of an extruded or free fragment at the L3-4 level on the left. This is not even mentioned on the follow up MRI of 8/27/07. I therefore feel that the level of most concern with the patient's injury in the 10/23/06 timeframe was the L3-4 and L5-S1 level. Interestingly, after the 02/22/07 injury, the most significant level of concern is the L4-5 level. These are distinctly different, as indicated. I would note, however, that the patient has a transitional vertebra and there is the possibility that the spaces were numbered differently between the two studies. This commonly occurs when there is the presence of a transitional vertebra. Some people will call it an L6 and some people will call it an S1, or even sometimes an L5. The original MRI was not available for review, although the report was. If, on direct comparison, the studies had been numbered differently with respect to spaces and the L3-4 level on the previous study was, in fact, the L4-5 level as dictated on the more recent August 2007 study, my disposition would change to the fact that this is [sic] represents a

> mild exacerbation of a predominantly pre-existing condition. I would have to physically have both studies to make a change in my present disposition.[1]

Dr. Amundson noted claimant had facet joint injury at L4-5 after the 2007 injury. And after the 2006 injury the main problem was L3-4 and L5-S1.

The claimant was referred to Dr. Florin Nicolae who performed bilateral facet joint injections on claimant at L2, L3, L4, L5 and S1 on January 30, 2008. And on February 6, 2008, Dr. Nicolae performed radio frequency denervation on claimant at L2, L3, L4, L5 and S1.

On May 7, 2008, claimant was again seen by Dr. Amundson and reported a significant improvement in his back pain. Claimant noted that he did not feel that he needed any further treatment as the pain into his hips had resolved and the only thing he mentioned was that if he sat too long he experienced some pain in his tailbone. After discussing restrictions with claimant it was agreed restrictions were not necessary. Based on the AMA *Guides*[2], Dr. Amundson placed claimant in DRE Category I which resulted in a 0 percent impairment to the body as a whole. The doctor explained his rating in the following manner:

> Q. And what factors in particular did you rely on to determine that he qualified for a DRE Category I?
>
> A. The fact that basically he had no radiculopathy, which took him below - - it was between frankly a DRE I and DRE II for complaints of back symptoms and when I initially had seen him with his restricted range of motion and little bit more elevated pain and restrictions, I would have given a DRE II, but when I last saw him and he said his only complaint was of some discomfort with sitting but otherwise was able to perform his activities without restriction, I gave him a DRE I and a 0 percent whole person impairment.[3]

Dr. Amundson was asked if claimant would have qualified for a DRE II rating after the injury in 2006 and the doctor opined that if claimant had continued with symptoms or complaints he would have qualified for a such a rating but instead the absence of treatment in the six month interim between injuries supported claimant's contention that his problems from the 2006 injury had resolved.

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[1] Amundson Depo., Ex. 3.

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

[3] Amundson Depo. at 13.

Dr. Amundson agreed that it appeared claimant had radiculopathy into his left leg after the 2006 injury that appeared to resolve with the two epidurals. And the doctor concluded that the 2007 accident had injured the facets in his back. When provided the testimony claimant provided at the regular hearing Dr. Amundson was not surprised by the recurrence of claimant's back complaints. And because claimant complained of pain extending into the right leg down to the knee the doctor opined that such radicular L5 distribution complaints would qualify claimant for a DRE Category III impairment of 10 percent to the whole person. But Dr. Amundson was unable to state whether the pain claimant complained of at the regular hearing was a progression from the 2006 or the 2007 accident. Dr. Amundson testified:

> Q. (By Mr. Johnston) Assuming that the claimant was testifying truthfully at that hearing, my question remains the same.
>
> A. Then I would say it was a progression of some of the anatomic findings that he had on his MRIs, in other words, it makes a huge difference. In 2006 when it presented, it was more of an S1 radiculopathy and he underwent epidurals steroids. When he was injured in 2007, it was more that of facet syndrome and he responded appropriately and it sounds like relatively well to facet injections and rhizolysis. I haven't seen him since, I don't know what his manifestations of pain or clinical complaints are to be able to tell you are they more compatible with recurrence of his 2007 symptoms, whether they are more consistent with his 2006 symptoms, whether they are more consistent with the facet arthropathy and facet pain we diagnosed and treated in 2007 or whether they are more compatible with spinal stenosis that was treated previously.[4]

Claimant testified that after the facet injections and radio frequency denervation treatments provided by Dr. Nicolae that for a year and a half he had no pain. But the pain started returning and claimant filed for a preliminary hearing to have Dr. Amundson authorized to prescribe additional facet injections. Following a preliminary hearing on February 10, 2009, the ALJ denied claimant's request for additional medical treatment.

At the request of claimant's attorney, Dr. Edward Prostic, a board certified orthopedic surgeon, examined and evaluated claimant on September 12, 2010. The doctor reviewed claimant's medical records and also took a history from claimant. Upon physical examination, claimant had some reduced range of motion in his right hip while in a flexed position. The right calf was one-half inch greater in circumference than the left. X-rays revealed an anterior wedge deformity at L1 with severe degeneration at L1-2; moderate disk space narrowing at L5-S1 with short lumbar pedicles at L5; traction osteophytes are noted diffusely; posterior facet arthropathy is noted diffusely and minimal joint space narrowing at the right hip. Dr. Prostic agreed that claimant did not have radiculopathy when he was examined.

[4] Amundson Depo. at 42-43.

Dr. Prostic opined that the facet injection and radio frequency denervation procedure, if successful, is likely to be repeated in nine months to a year. The doctor further opined that the accident on July 23, 2007, aggravated a preexisting degenerative disk disease in claimant's low back. Dr. Prostic testified that claimant had a preexisting 5 percent impairment to his back based upon DRE II before the accident on July 23, 2007. Based on the AMA *Guides*, using the range of motion model, Dr. Prostic opined claimant had an additional 5 percent impairment to his low back due to the accidental injury on July 23, 2007.

Dr. Prostic placed permanent restrictions on claimant of: (1) no lifting greater than 20 pounds from knee to shoulder and half that much frequently; (2) no frequent bending or twisting at the waist; (3) no forceful pushing and pulling; and, (4) minimal use of vibrating equipment. Dr. Prostic reviewed the list of claimant's former work tasks prepared by Mr. Bud Langston and concluded claimant could no longer perform 9 of the 10 tasks for a 90 percent task loss.

On cross-examination Dr. Prostic agreed it would be reasonable that the same restrictions should have been in place after the 2006 accident but the doctor further noted that he did not know the extent claimant had rehabilitated himself. And if Dr. Prostic had rated claimant under the DRE method for the July 23, 2007 injury, the claimant would have been a DRE II which is a 5 percent whole person impairment which is the same as the doctor indicated was preexisting. Finally, Dr. Prostic agreed that he could not identify any symptoms or exam studies of claimant that couldn't be explained by simply the wearing off of the epidural injections claimant had received after lifting the television at home.

On April 19, 2011, the ALJ ordered an independent medical examination of claimant to be performed by Dr. Peter Bieri. The doctor was to provide an evaluation and disability rating as well as recommendations regarding appropriate future medical treatment, if any. Dr. Bieri was also to provide restrictions and opinions regarding task loss, if any, as well as apportionment of any preexisting impairment.

Dr. Bieri performed a physical examination of claimant's lumbar spine and found no visible or palpable muscle spasm at rest but there was very slight tenderness to diffuse palpation radiating to the right hip. The doctor opined claimant's diagnosis was consistent with a lumbar strain which aggravated his preexisting degenerative disk disease and claimant had a history of disk changes with previous clinical lower extremity radiculopathy. At the time of Dr. Bieri's evaluation, claimant was at maximum medical improvement.

Dr. Bieri opined that his physical examination did not reveal any objective abnormality that could not be explained as a natural, direct, and probable consequence of the medical condition claimant had in 2006. Dr. Bieri further noted that he could not state that claimant sustained any additional permanent impairment to his lumbar spine as a result of the July 23, 2007 incident. Dr. Bieri opined that claimant's loss of range of motion

to his lumbar spine was most likely attributable to his preexisting injury. And Dr. Bieri explained that claimant would have had a DRE II impairment before the July 23, 2007 incident and that remains his impairment. But Dr. Bieri agreed claimant's injury on July 23, 2007, appears to be an aggravation of a preexisting condition, manifested primarily by subjective complaint of pain.[5]

Dr. Bieri assigned permanent restrictions for a medium physical demand level. This limits claimant from lifting 50 pounds, frequent lifting not to exceed 20 pounds, no more than 10 pounds of constant lifting. Dr. Bieri reviewed the list of claimant's former work tasks prepared by Mr. Bud Langston and concluded claimant could no longer perform 3 of the 10 tasks for a 30 percent task loss.

It is significant to note that although Dr. Bieri testified that he looked at MRIs both before and after the July 23, 2007 incident, his report and testimony indicated that he compared the MRI study of August 27, 2007, and that performed November 18, 2010. And both those studies were done after the July 23 2007 accident. And on cross-examination Dr. Bieri agreed he could not make comparisons with the earlier studies because he did not have them.

Bud Langston, vocational rehabilitation consultant, conducted a personal interview with claimant on March 8, 2011, at the request of his attorney. He prepared a task list of 10 nonduplicative tasks claimant performed in the 15-year period before his injury.

At the time of the regular hearing, claimant was still having pain in his lower back, right hip, right knee and tailbone. Sitting and standing on concrete too long or bending or lifting causes increased pain in claimant's back.

Timely Notice

Initially, respondent argues that claimant failed to provide timely notice of his accidental injury on July 23, 2007. K.S.A. 44-520 provides:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that

[5] Dr. Bieri's IME report (May 17, 2011) at 6.

> in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant's testimony was uncontradicted that he told his supervisor that he had hurt his back and was sent to the plant nurse. The plant nurse gave claimant some ice to put on his back and some ibuprofen. The next morning when he reported to work his back pain had not improved and he was referred by respondent to St. Francis Hospital's emergency room for treatment. The fact claimant was referred for treatment certainly corroborates claimant's testimony that he provided notice to his supervisor that he had injured his back at work. The evidence establishes claimant provided notice of his work-related injury to his supervisor the same day the accident occurred. Claimant has met his burden of proof to establish that he provided timely notice of his accidental injury.

Injury Arising out of and in the Course of Employment

Respondent next argues claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment. The Board disagrees. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[6] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[7]

Dr. Amundson noted claimant had suffered a permanent aggravating injury to his low back as a result of the accident on July 23, 2007. And the doctor noted that he assigned a permanent impairment albeit a DRE I, 0 percent impairment to the whole person. Dr. Bieri noted the accidental injury on July 23, 2007, aggravated claimant's pre-existing degenerative disk disease in his lumbar spine. And Dr. Prostic noted claimant suffered an accidental injury to his low back on July 23, 2007, which aggravated his pre-existing degenerative disk disease. The doctors disagreed whether the injury resulted in permanent impairment, nonetheless, the doctors agreed that as a result of lifting the skid at work claimant suffered accidental injury which aggravated the preexisting degenerative disk disease in his low back. Claimant has met his burden of proof to establish that he

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[6] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[7] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp*., 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

suffered accidental injury arising out of and in the course of his employment on July 23, 2007.

Nature and Extent of Disability

The facts establish that claimant's injury at home in October 2006 had resulted in back pain with radiculopathy down into his **left** leg. After epidurals he was released to return to work without restrictions and he worked for approximately six months without seeking additional medical treatment for his back. On July 23, 2007, claimant again injured his low back while lifting a skid at work. After the work-related accidental injury claimant complained of low back pain extending down into his **right** buttock. Initially, the radio frequency denervation provided claimant significant relief but within a year his low back pain returned and he sought additional treatment hoping to receive additional injections. Claimant's low back pain increased with pain radiating into his **right** hip and **right** knee.

Both Drs. Prostic and Bieri opined claimant suffered a preexisting 5 percent impairment based upon review of claimant's medical records after the October 2006 injury. Dr. Prostic opined claimant had suffered an additional 5 percent permanent impairment after the 2007 work-related accidental injury but Dr. Bieri concluded claimant had not suffered any additional permanent impairment.

Dr. Amundson noted claimant had suffered injuries to separate portions of his lumbar spine as after the 2006 incident claimant's pain was more an S1 radiculopathy but when he was injured in 2007, it was more that of facet syndrome at L4-5. As previously noted, when Dr. Amundson released claimant he concluded claimant had a permanent impairment but it was limited to 0 percent whole person because claimant's complaints had resolved after the radio frequency denervation. But Dr. Amundson agreed that he was not surprised that claimant's complaints returned and the doctor noted that is the normal course for 70 percent of patients. And when provided claimant's testimony from the regular hearing regarding his current complaints of low back pain radiating down into his right hip and knee the doctor opined those symptoms would qualify for a DRE III, 10 percent impairment. But the doctor was equivocal whether the return of low back pain was from the problems associated with the 2006 incident or the 2007 work-related accidental injury.

Initially, it must be noted that Dr. Bieri's opinion that claimant did not suffer additional permanent impairment is undermined because the doctor relied upon the fact that the two MRI studies of claimant's low back did not show any significant changes. However, the MRIs Dr. Bieri referred to were both taken after the July 23, 2007 work-related accidental injury and simply do not provide a basis for comparison of claimant's back after the 2006 accident versus after the 2007 accident. And Dr. Bieri agreed that he did not review the initial MRI taken after the 2006 incident. Conversely, Dr. Amundson

noted there were significant differences between the report from the initial 2006 MRI and the findings on the two subsequent MRIs taken after the 2007 accidental injury.

Dr. Prostic concluded claimant had an additional 5 percent permanent impairment after the July 23, 2007 work-related accidental injury. And Dr. Amundson agreed that the return of claimant's back pain and symptoms was not unexpected and warranted a 10 percent rating. Moreover, Dr. Amundson originally noted he would have given claimant a DRE II 5 percent rating after the work-related accident had the claimant's symptoms persisted. Although Dr. Amundson equivocated regarding the cause of claimant's current symptoms it is significant to note claimant's symptoms were different after the 2006 accident as compared to his symptoms following the 2007 accident. Dr. Amundson specifically noted the symptoms after the 2006 accident included left side radiculopathy whereas the symptoms after the 2007 work-related accident focused on the right side.

Both Drs. Bieri and Prostic concluded claimant had a preexisting 5 percent impairment after the 2006 incident at his home. Dr. Prostic opined claimant suffered an additional 5 percent after the 2007 work-related accidental injury. Dr. Amundson initially concluded claimant had no impairment but that opinion was based upon the lack of pain complaints after the radio frequency denervation. And Dr. Amundson opined claimant's testimony at regular hearing that he had pain into his right hip and knee would warrant a 10 percent impairment. Because claimant's complaints have returned and are located on the right side which corresponds with his complaints after the 2007 work-related accidental injury the Board concludes claimant now has a 10 percent functional impairment with 5 percent preexisting. Accordingly, claimant has met his burden of proof to establish he suffered a 5 percent permanent partial whole person functional impairment as a result of the July 23, 2007 work-related accidental injury.

Claimant argues that he is entitled to a work disability. Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical

> evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

As a result of his accidental injury on July 23, 2007, claimant injured his low back and is entitled to compensation pursuant to K.S.A. 44-510e. A work disability is the average of the claimant's work task loss and actual wage loss. The task loss opinions were provided by Dr. Prostic (90 percent) and Dr. Bieri (30 percent) who reviewed the task list prepared by Mr. Langston. The ALJ gave equal weight to both opinions and concluded claimant suffered a 60 percent task loss. The Board agrees and affirms.

After claimant was unable to continue employment with respondent he obtained work as a limousine driver. He also did some carpentry work with a friend. The ALJ noted the uncontradicted income records established claimant suffered a wage loss of 92 percent. The Board agrees and affirms.

And averaging the 60 percent task loss with the 92 percent wage loss results in a 76 percent work disability. But K.S.A. 44-501(c) provides that compensation awards shall be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. That statute reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[8]

As previously noted, the Board finds claimant had a 5 percent preexisting functional impairment. The award of compensation must be reduced by the amount of preexisting impairment which results in a 71 percent work disability. Consequently, the ALJ's Award is modified to reflect claimant has met his burden of proof to establish that he suffered a 71 percent work disability.

Retirement Offset

Respondent argues that that claimant's compensation benefits should be reduced by $446.62 per a week as an offset for the retirement benefits claimant received from the respondent.

[8] K.S.A. 44-501(c).

K.S.A. 44-501(h) provides:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

When claimant provided respondent his light-duty work restrictions after the injury on July 23, 2007, the respondent did not provide any accommodated work. Consequently, claimant continued to receive his regular paychecks for six months as short-term disability payments for approximately six months. When the short-term disability payments ran out claimant was told he could receive long-term disability payments but the amount would be approximately half what he had been receiving. Claimant noted he could not afford such a reduction in compensation and was told retirement was the only other option, consequently, claimant retired. He then received a $2,700 a month retirement check from February 2008 to February 2009. Claimant then stopped receiving that amount and received two checks from respondent which he rolled over into an IRA account. One check was denominated "Hallmark Cards P/S Ownership Savings Plan" and was in the amount of $419,388.59.[9] Claimant explained the P/S stood for profit sharing and was another name for the 401k plan. The other check was denominated "Hallmark Retirement Trust" and was in the amount of $98,520.66.[10]

Respondent argues claimant agreed that respondent made all the contributions to the plans and thus it is entitled to an offset. The Board disagrees. Initially, it should be noted claimant referred to the profit sharing plan and the 401k plan as the same thing. But he explained respondent put money into the account based upon profits the respondent made. Claimant testified:

> Q. Now you were asked questions about a 401K retirement plan. Do you have any special knowledge about whether it's a retirement plan?
>
> A. No.

[9] Farris Depo., Ex. 8.

[10] *Id*.

Q. You mentioned earlier that you had a profit sharing plan?

A. Yes.

Q. What was that?

A. Let me get it straight here. They put money in for the profits the company made, different amounts, different years, according how good profits were.

Q. What was the other name for that plan besides profit sharing?

A. That would have been 401K.

Q. And then you had a plan that was called a retirement plan?

A. Yes.[11]

And claimant was referring to the profit sharing plan when he answered that respondent put all the money into that account. But the amount placed in the account was based upon annual profitability of the respondent.

The Board, however, finds the creation of a profit sharing plan can be different from the creation of a retirement plan. As determined by the Kansas Court of Appeals in *Green,*[12] in quoting with approval from the Board's decision, the court states: "The Board construes 'retirement benefit' as a benefit paid by reason of age and/or years of service."

In *Green*, the court was asked to differentiate between retirement benefits based upon age and/or years of service and disability benefits based upon injury. The court found the two terms differed. The court, in *Green*, found disability benefits do not qualify under K.S.A. 1999 Supp. 44-501(h) for purposes of the offset.

Likewise, here, the terms "retirement benefits" and "profit sharing" are not synonymous. Retirement benefits, as noted above, are based upon age and/or years of service. Profit sharing contributions, on the other hand, are determined by a company's profits. The Board acknowledges the profit sharing plan is fully funded by the employer. However, profit sharing contributions are made only when a company earns a profit. There is no guarantee of payment into the plan. Accordingly, the Board finds that the employer's profit sharing plan does not meet the definition of retirement benefits for the purposes of the statutory offset provisions of K.S.A. 1999 Supp. 44-501(h).

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[11] R.H. Trans. at 38-39.

[12] *Green v. City of Wichita*, 26 Kan. App.2d 53, 977 P.2d 283, *rev. denied* 267 Kan. 888 (1999).

Turning to the retirement account, there is simply no evidence, as required by statute, of the amount that respondent contributed to this account. When claimant said the respondent made all the contributions, he was clearly answering a question about the profit sharing account as claimant testified the profit sharing account and the 401k account was the same account. Claimant testified:

> Q. Now the 401K, that's a plan where you would contribute something and they would match it?
>
> A. No.
>
> Q. They just put money in a 401K for you to save for your retirement?
>
> A. Yeah.[13]

The statute requires evidence of the amount of contribution respondent made to the retirement account in order to qualify for an offset. Respondent failed to establish the amount it contributed to the retirement account and is not entitled to an offset.[14]

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[15] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated August 28, 2011, is modified to reflect that claimant is entitled to compensation for a 71 percent work disability.

Claimant is entitled to permanent partial disability compensation at the rate of $510 per week not to exceed $100,000 for a 71 percent work disability which is due and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

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[13] R.H. Trans. at 24-25.

[14] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[15] K.S.A. 2010 Supp. 44-555c(k).

Dated this _____ day of January, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent
Brad E. Avery, Administrative Law Judge